**Service Employees' International Union, AFL–CIO, Building Service Employees' Union, Local 87 (Cervetto Maintenance)** ***and*** **Angela Rangel.** Case 20–CB–8744

December 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The sole issue presented for Board consideration in this case[1] is whether the judge erred in failing to recommend a provisional make-whole remedy for the Respondent's unlawful refusal to process the grievance of Charging Party Angela Rangel. The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to modify the remedy for the reasons which follow.

At the unfair labor practice hearing before the judge, the Respondent exercised its option under *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne II)*, 290 NLRB 817 (1988), to defer litigation of the merits of Rangel's grievance to the compliance stage of this proceeding. Based on the Respondent's action, the judge denied the General Counsel's request to include a provisional make-whole remedy in the recommended Order. In exceptions, the General Counsel contends that the judge has misconstrued Board precedent in refusing to recommend the requested remedy. The Respondent apparently concurs in the General Counsel's position.

We agree with the parties that the recommended Order should be modified. When, as in the present case, the General Counsel has met the initial burden of proving that an employee's grievance was not clearly frivolous,[2] the Board will permit the respondent union to litigate the ultimate merits of that grievance at either the initial unfair labor practice stage or the compliance stage of a proceeding. If the union elects to defer litigation until the compliance stage, it is customary and appropriate to include a provisional make-whole remedy in the Board's Order. See *Mack-Wayne II*, supra at 822, and *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack Wayne I)*, 279 NLRB 1074, 1075 (1986). Accordingly, we shall modify the judge's remedy to provide that: (1) the Respondent shall request Cervetto Building Maintenance Co. to give Rangel the vacation and overtime pay which she claims it owes her; (2) if Cervetto refuses, the Respondent shall promptly pursue grievance and arbitration proceedings in furtherance of Rangel's claim; (3) Rangel shall be permitted her own counsel in grievance and arbitration proceedings, if she so chooses, and the Respondent shall reimburse her for reasonable legal fees of such counsel; and (4) if for any procedural or substantive reason the Respondent is unable to pursue the grievance and arbitration procedure, it shall make Rangel whole for any losses suffered from the unlawful failure to process her grievance. Interest on any amounts owed by the Respondent to Rangel shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Service Employees' International Union, AFL–CIO, Building Service Employees' Union, Local 87, Brisbane, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discriminatorily refusing to process a grievance for arbitrary reasons.

(b) In any like or related manner coercing or restraining employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Request Cervetto Building Maintenance Co. to reimburse Angela Rangel for vacation and overtime pay which she claims it owes her, and if that employer refuses to pay Rangel as requested, promptly pursue the grievance procedure, including arbitration, in good faith with all due diligence.

(b) Permit Angela Rangel to be represented by her own counsel in the grievance and arbitration procedure, and pay the reasonable legal fees of such counsel.

(c) In the event that it is not possible to pursue the remaining stages of the grievance procedure, resulting in the inability to resolve the grievance of Angela Rangel on the merits, make Rangel whole, with interest, for any loss of pay she may have suffered as a result of its unlawful conduct in failing to process her grievance.

(d) Post at its business offices and meeting places copies of the attached notice marked ''Appendix.''[3] Copies of this notice, on forms provided by the Regional Director for Region 20, after being signed by

[1] On September 3, 1992, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed exceptions. The Respondent thereafter filed a statement that it did not oppose the modification of the judge's recommended Order sought by the General Counsel in exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The judge found that the General Counsel proved an ''intentional failure to act on an apparently meritorious grievance.''

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

the Respondent's authorized representative, shall be posted by the Respondent at its business office immediately upon receipt and be maintained by it for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

### NOTICE TO MEMBERS
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily or arbitrarily refuse to process an employee's grievance.

WE WILL NOT in any like or related manner restrain or coerce employees in the excercise of rights guaranteed by Section 7 of the Act.

WE WILL request Cervetto Building Maintenance Co. to reimburse Angela Rangel for vacation and overtime pay which she claims was missing from her final paycheck, and if that employer refuses to pay Rangel as requested, WE WILL promptly pursue the grievance procedure, including arbitration, in good faith with all due diligence.

WE WILL permit Angela Rangel to be represented by her own counsel in the grievance and arbitration procedure, and WE WILL pay the reasonable legal fees of such counsel.

WE WILL make Angela Rangel whole, with interest, for any loss of pay she may have suffered as a result of our unlawful failure to process her grievance, if it is not possible to determine the merits of that grievance through the grievance and arbitration procedure.

### SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL–CIO, BUILDING SERVICE EMPLOYEES' UNION, LOCAL 87

*Boren Chertkov, Esq.*, for the General Counsel.
*Stewart Weinberg, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of San Francisco, California, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at San Francisco, California, on March 30, 1992,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 20 on September 24, and which is based on a charge filed by Angela Rangel (Charging Party or Rangel) on August 2. The complaint alleges that Service Employees' International Union, AFL–CIO, Building Service Employees Union, Local 87 (Respondent) has engaged in a certain violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (the Act).

### Issue

Whether Respondent's failure to file and process a grievance of its member Rangel was arbitrary, perfunctory, and a breach of the fiduciary duty owed by Respondent to the employees it represents.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. THE EMPLOYER'S BUSINESS

Respondent admits that Cervetto Building Maintenance Co. is a California corporation operating a janitorial contracting service in Brisbane, California, and that at all times material herein, Employer has been and, is now a member of the San Francisco Maintenance Contractors Association (Association), an organization composed of employers engaged in providing janitorial services which organization exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations. Respondent further admits that during the calendar year ending December 31, the employer-members of the Association referred to above, in the course and conduct of their business operations, collectively provided services valued in excess of $50,000 to enterprises within the State of California which meet the Board's standards for the assertion of jurisdiction on a direct basis. Accordingly, Respondent admits, and I find, that the Employer is an employer within the meaning of Section 2(l4) of the Act and engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The Respondent, Service Employees' International Union, Building Service Employees Union, Local 87 admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein refer to 1990 unless otherwise indicated.

## III. THE ALLEGED UNFAIR LABOR PRACTICE

### A. *The Facts*

During all times material to this case, Respondent maintained a membership of approximately 4500 persons. In March, Richard Leung, Respondent's sole witness, was elected president. In the course of performing his duties as president, Leung appointed Julio Solorzano as one of three business agents employed by Respondent to care for and attend to the needs of the membership. Solorzano was subsequently terminated by Leung for incompetence and did not testify in the case.[2] It is Solorzano's conduct as an admitted agent of the Union which under General Counsel's theory, constitutes the primary focus of this case. Respondent argued at hearing, however, that even if Solorzano's performance of his duties is found deficient, as Respondent itself found when it fired Solorzano, it cannot be called to account because Rangel too was derelict in not complaining to Solorzano until it was too late under the terms of the collective-bargaining agreement to grieve the matter. Under Respondent's theory, Solorzano's conduct is rendered essentially irrelevant. To explore this matter further, I turn to the record.

Angela Rangel was the sole witness for the General Counsel, both in his case-in-chief, and as recalled briefly in rebuttal.[3] Based on her unrebutted testimony, I find that for more than 20 years, Rangel has worked as a janitress. Although her employer has changed over the years, for all or most of her employment, she has cleaned the same medical building in San Francisco and continues to work there now.

Prior to April 15, Rangel worked for Cervetto Building Maintenance (Employer), which was a member of the Association. The latter was party to a collective-bargaining agreement with Respondent (G.C. Exh. 2).

On April 15, Employer lost the maintenance contract to clean the medical building where Rangel worked. She received her final paycheck which failed to include 3 weeks' vacation pay and 8-1/2 hours of overtime pay. According to Rangel, the missing wages amounted to about $1300.

Upon noting the discrepancy, Rangel called the Employer and talked to Ray Houck, the Company's accountant, to whom she explained the problem. Houck did not testify, but according to Rangel, he told her he would talk to the owner Joe Cervetto.[4] When Rangel called back 2 weeks later on the next payday, Houck told her that her missing check was not there and she should call back later.

There followed other calls from Rangel to Houck in May and again in June, none of which were effective in obtaining the missing wages. In June, Houck referred Rangel to her former supervisor, David Dellanini, to obtain from him approval of Rangel's claim for vacation and overtime pay. In July, Rangel contacted Dellanini, explained the problem and asked him to write a letter on her behalf, which he did. The letter (G.C. Exh. 3) reads as follows:

> Cervetto Building Maintenance July 1, 1990
> 100 Northhill Drive
> Brisbane, Ca.
> Attention: Ray
> Dear Ray:
>
> As per my conversation with Angela Rangel regarding her past due sick leave and vacation pay; pay her and the other girls, Julie and Kika whatever they have coming form (sic) the Stonestown account. I understand from Angela that you were waiting for me to approve the payments. Angela also has eight and one half hours for overtime. Also, Nelson Dornel has done work at the French Medical Building in Nov. 1989 which he is still waiting for and he also has work in on Stonestown that he is still waiting for. So, please pay these people what they are owed you have my O K.
>
> Sincerely,
> /s/ D. Dellanini
> David Dellanini

On July 2, Rangel personally delivered the letter to Houck, who assured her he would give the letter to Joe Cervetto.

On the next payday, Rangel again called Houck to ask him if her check arrived, but he said it had not. In August or perhaps October, Rangel was not certain, she called Houck still again, but this time she was told he no longer worked there.

While the above series of events was unfolding, Rangel was also attempting to get Respondent to act on her behalf. There is uncertainty as to when she first contacted Respondent, either May, as she testified, or in June, as she told the Board agent in her affidavit. There is no disagreement that in May or June she spoke to Solorzano regarding her missing wages and explained the problem to him.

Solorzano promised to call Joe Cervetto about Rangel's missing money. There followed a series of phone calls from Rangel to Solorzano about every 2 weeks during which time Solorzano assured Rangel he was working on the matter.

In December Rangel left on vacation. Upon her return in January, she discovered that her two coworkers referred to in the Dellanini letter recited above, had received their vacation and overtime pay. One of the women told Rangel later that Rangel didn't receive her money because she had been away on vacation.

When Rangel again called Solorzano to complain about her missing wages, Solorzano professed to be surprised that she had not been paid since her two coworkers had been paid in November. Increasingly frustrated, Rangel complained to Solorzano that she had been paying union dues, but that he was not helping her. At this point, Solorzano again promised to write a letter to Joe Cervetto, but there is no evidence he ever did so.

Upon Rangel's receipt of the Dellanini letter recited above, she personally delivered it to Respondent's offices for delivery to Solorzano. A short while after this, Rangel again called Solorzano but he told Rangel that he was no longer the business agent assigned to her. Nevertheless, Solorzano promised to continue to help Rangel and even promised to file a grievance over the issue. When Solorzano was eventually fired, there was no evidence he wrote or filed a grievance, wrote any letters, made any phone calls, or did anything at all on Rangel's behalf.

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[2] Solorzano's termination was timely grieved and is now awaiting decision on its merits from an arbitrator.

[3] Rangel testified in Spanish through an interpreter.

[4] In light of Rangel's inability to testify in English at hearing, a fair question concerns the language in which Rangel was talking to Houck and how effectively she was communicating with him. Unfortunately, the record is silent on these matters.

After Solorzano had been fired for incompetency and lack of action on the Rangel case and other cases, Leung discovered that the Employer was allegedly in bankruptcy. Leung also testified that he believed Solorzano's replacement contacted Rangel to discuss the Cervetto case with her. However, in rebuttal, Rangel denied that after July, anyone from Respondent had contacted her, and I credit her testimony.

In conclusion, I note the following exchange between the General Counsel and Leung on cross-examination (Tr. 52–54:

> And I believe someone may have talked to Ms. Rangel, I don't know. I did not personally.
>
> Q. In other words, then after you discussed the situation with Solorzano where the Rangel/Cervetto matter seemed rather vague in terms of response from [Solorzano], you think somebody may have called Ms. Rangel?
>
> A. Right. At the time another business agent took over Solorzano's cases.
>
> Q. And did you follow-up in terms of whether or not that contact had been made with Ms. Rangel.
>
> A. I was not appraised of the follow-up, no.
>
> Q. So as far as you know, since the time that the charge was filed in this case in August until the present, there's been nothing further done with regard to Ms. Rangel's concern about vacation pay or overtime pay?
>
> A. Not that I know of.
>
> . . . .
>
> By Mr. Chertkov:
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> Q. Is it the union's position or your position that Ms. Rangel does not have a legitimate claim for overtime pay or vacation pay [As of today]?
>
> . . . .
>
> THE WITNESS: Frankly, I don't even know about the case enough to appraise the merits of it.
>
> I never met with Ms. Rangel directly to go over her case, therefore, I'm not in any position to evaluate the merits of it.

B. *Analysis and Conclusions*

1. Legal principles and prima facie case

I begin by noting the duty of fair representation which Respondent owed to Rangel. This duty of fair representation is a legal term of art, incapable of precise definition. There is no code that explicitly prescribes the standards that govern unions in representing their members in processing grievances. Whether a union breached its duty of fair representation depends upon the facts of each case. *Eichelberger v. NLRB*, 765 F.2d 851, 854 (9th Cir. 1985), citing *Griffin v. Auto Workers*, 469 F.2d 181, 182 (4th Cir. 1972).

The Board too has often noted and applied the duty of fair representation. For example in *Teamsters Local 337*, 307 NLRB 437 (1992), the Board stated:

> It is well settled that a union breaches its duty of fair representation toward employees it represents when it engages in conduct affecting those employees' employment conditions which is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). It is also well settled, however, that something more than mere negligence or the exercise of poor judgment on the part of the union must be shown in order to support a finding of arbitrary conduct. *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446 (1974).

Thus, with these general principles in mind, I turn back to the record to apply the law to the facts of this case which are largely undisputed. On April 15, Rangel changed employers and found her first paycheck from her old employer short by $1300. As I understand Respondent's theory of defense, it is as of April 15 when Rangel's duty to make a timely complaint to Respondent regarding her short pay attached. As support for this contention, Respondent invites me to examine the applicable collective-bargaining agreement (G.C. Exh. 2, sec. 20.1) [Grievance Procedure], which in pertinent part reads as follows:

> Any difference between the Employer and the Union involving the meaning or application of the provisions of this Agreement shall constitute a grievance and shall be taken up in the manner set forth in this Section. A grievance need not be considered unless the aggrieved party serves upon the other party a written statement setting forth the facts constituting the alleged grievance. For a discharge case grievance, such notice must be served within ten (10) days from the date of discharge. Such written statement concerning any other type of grievance must be served within fifteen (15) days of its occurrence or the discovery thereof by the aggrieved party. It is the intent of the parties that reasonable diligence be used in the discovery and reporting of alleged grievances so they may be adjusted or dismissed without undue delay. The Employer and the Union agree to use their best endeavors by informal conferences between their respective representatives to settle any grievance within ten (10) days after service of such written statement. . . . Proposals to add to or change this Agreement shall not be arbitrable. Neither an arbitrator nor a panel of representatives shall have any authority or power to add to, alter or amend this Agreement.

As the facts reflect, Rangel did not immediately call the Union, but waited until May or June. If Respondent is correct in its contention, then it may be entitled to dismissal because the time to file a grievance had expired by the time Rangel contacted the Union. Before deciding this question, I should place the issue in proper context—both legally and factually.

To comply with its duty of fair representation, a union is required to conduct some minimal investigation of grievances brought to its attention. *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir. 1982) (citations omitted). In this case, Solorzano apparently conducted no investigation at all. Other than discussing the issue with Rangel from time to time, the record shows no activity undertaken to resolve the matter.

I find that Solorzano's periodic conversations with Rangel in which he falsely promised to attempt to resolve the matter lulled Rangel at least initially into the mistaken belief the Respondent could and would resolve the matter. These intentional misstatements and the intentional failure to act on an apparently meritorious grievance present a compelling prima

facie case that Respondent violated the Act as alleged and I so find. In this respect, I find beyond challenge, that at all times material to this case, Solorzano, was dealing with Rangel within the scope of his employment. Accordingly, Respondent is responsible for the acts of its agent, Solorzano. *Meat Cutters Local 248*, 222 NLRB 1023 (1976).

### 2. Respondent's defense

No evidence was presented to show that Solorzano harbored any animus against Rangel. Indeed because Solorzano apparently treated all or most of Respondent's members with whom he dealt with equal ineptitude, he was eventually terminated by Respondent. However, the fact that Rangel was not singled out is hardly a defense. It merely means that others might be victims too.[5] More to the point is Respondent's claim that by the time that Rangel first brought her pay dispute to Solorzano's attention, it was too late for even the most skillful business representative to file or process a grievance under terms of the collective-bargaining agreement cited above.

In another context, the Board has approved the principle that ''the law does not require futile ritual. *Sheet Metal Workers Local 18 (Rohde Bros.)*, 298 NLRB 50 (1990). Nevertheless, I find that Respondent has failed to prove it should be exonerated due to the alleged untimely complaint made by Rangel. To support this conclusion, I note the following:

(1) It is not clear to me that Rangel had adequate notice under the contract to start the 15-day time limit running prior to her first contact of Solorzano in May or June. At no time did Cervetto refuse her claim. Houck led her to believe the matter would be resolved to her satisfaction.

(2) The defense now proffered was never stated at the time that Rangel first contacted Respondent. Rather it is an after-the-fact justification upon which Respondent should not now be permitted to rely. Cf. *Philips Industries*, 295 NLRB 717, 718 (1989). Compare *Communications Workers Local 6320 (AD/VENT)*, 294 NLRB 810 (1989).

(3) Even if Rangel's complaint was untimely under section 20.1 of the collective-bargaining agreement, there is no evidence to show that Solorzano would have processed Rangel's grievance any differently than he did when she complained in May or June.

(4) Even if Rangel's complaint was untimely, Respondent was not completely foreclosed from taking action. The Board has held that the duty of fair representation does not require a union to resort to extraordinary measures to process grievances. Rather a union's obligation is merely to refrain from conduct that is arbitrary, discriminatory or in bad faith. *Communications Workers Local 6320*, supra at 811. Thus, if Solorzano had undertaken ordinary measures like appealing to Cervetto's sense of fairness, like requesting Cervetto to waive the contractual time limits or like arguing the equities based on the other two cleaning women having receiving their pay, Solorzano could not have guaranteed Rangel success.[6] But he would have guaranteed her a chance, a hope, perhaps even a prayer of obtaining her money due and owing. This Solorzano did not do. This was more—much more than mere negligence.

For the reasons stated above, I find that Respondent violated Section 8(b)(1)(A) of the Act.[7]

## CONCLUSIONS OF LAW

1. Cervetto Building Maintenance Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Service Employees' International Union, Building Service Employees Union Local 87 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(b)(1)(A) of the Act when its agent Solorzano failed and refused to process the grievance of its member Angela Rangel with respect to the Employer failing to pay her certain overtime and vacation pay due and owing.

4. The unfair labor practices found to have been committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that Respondent has violated Section 8(b)(1)(A) of the Act, it is recommended that it be ordered to cease and desist therefrom and to post appropriate notice. A make-whole remedy is deferred in accord with Respondent's wishes (Tr. 64) until compliance.[8]

[Recommended Order omitted from publication.]

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[5] Personal animosity is not the sine qua non of a breach of the union's duty of fair representation. A union may not refuse to represent an employee for any improper reasons, of which personal animosity is just one, the precise reason is unimportant. *Bennett v. Glass & Pottery Workers Local 66*, 958 F.2d 1429, 1438 (7th Cir. 1992).

[6] Respondent presented no evidence to show a past practice under the collective-bargaining agreement of employers never waiving the time limits for filing grievances.

[7] According to Professor Morris, it has been suggested that the union's failure to act on behalf of the employee will not constitute a breach of the duty of fair representation unless the union is the exclusive means for the employee to obtain the remedy sought. II Morris, *Developing Labor Law*, p. 1329, fn. 211 citing *Archer v. Air Line Pilots Assn.*, 609 F.2d 934 (9th Cir. 1979), cert. denied 446 U.S. 953 (1980). Respondent suggested at hearing that Rangel's remedy initially and now was with the State Labor Commission. This contention was never litigated as a bona-fide defense. Accordingly, it is not necessary to decide whether Respondent is the exclusive means for Rangel to obtain the remedy sought.

[8] Curiously, General Counsel contends in his brief, pp. 12–13 that he is seeking a provisional make-whole remedy. However, in *Rubber Workers Local 250 (Mack-Wayne Closures)*, 290 NLRB 817 (1988), the Board indicated that a Respondent had the option of litigating the merits of a particular grievance in the underlying hearing or at compliance. This is the choice General Counsel put to Respondent at hearing. Respondent's attorney replied, ''We'd reserve that for compliance (Tr. 64). In accord with *Mack-Wayne Closures* and the position taken by General Counsel at hearing, I make no ruling at this time on any make-whole remedy, provisional or otherwise.